In the

Supreme Court of the United States

October Term, 1978

No. 78-752

T. L. BAKER,

Petitioner,

v.

LINNIE CARL MCCOLLAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The petitioner, T. L. Baker, prays that a Writ of Certiorari issue to review the opinion and judgment of the Court of Appeals for the Fifth Circuit rendered in these proceedings on June 19, 1978.

OPINION BELOW

The opinion of the Court of Appeals is officially recorded in volume 575 F. 2d 509 (1978) and is set forth in the appendix to this petition pp. A-1 - A-7 (hereinafter referred to as "App.").

JURISDICTION

The judgment of the Court below (App., *infra*, pp. A-1 - A-7) was entered on June 19, 1978. A timely petition for a rehearing was denied on August 10, 1978 (App., *infra*, p. A-8). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the simple negligence of Petitioner in failing to establish administrative procedures which might have earlier secured the release of Respondent supports a cause of action against the Sheriff under 42 U.S.C. § 1983 though Respondent was arrested and confined in good faith reliance on a valid warrant in the name of Respondent.

2. Whether, as a matter of law, the Sheriff should be entitled to qualified immunity from claims made under 42 U.S.C. § 1983 when the good faith of the Sheriff is conceded and the reasonableness of the arrest and confinement was supported by a validly issued warrant in the name of Respondent.

3. Whether an official "causes" an unlawful confinement merely because he has failed to act to discover the mistakes of others which were the cause, in fact, of the unlawful confinement.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Constitution of the United States:

Section 1 of the Fourteenth Amendment to the Constitution provides in pertinent part:

> ". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. United States Code:

42 U.S.C. § 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE[1]

Petitioner T. L. Baker became Sheriff of Potter County on November 20, 1972 (Tr. 31) following the death of his predecessor (Tr. 82). At the time he became Sheriff, there was an outstanding warrant for the arrest of one "Linnie Carl McCollan" dated November 3, 1972 (P. Ex. 7). On December 26, 1972, the Potter County Sheriff's Department was notified that the said "Linnie Carl McCollan" was being held by the Dallas Police Department, and on December 30, 1972, a deputy was dispatched to return the prisoner on the warrant (Tr. 51, 52). Respondent was brought to the Potter County jail on December 30, 1972 and held there until released on January 2, 1973 (Tr. 54, 55).

Petitioner Baker was not keeping regular office hours during the holiday period of December 30, 1972 through January 1, 1973 (Tr. 95) but was in contact with the personnel at his office (Tr. 96). Upon being notified on January 2, 1973 that Respondent was claiming not to be the person sought by the warrant, Petitioner Baker investigated and determined that the warrant should have been issued for "Leonard McCollan" and ordered Respondent released (Tr. 97, 98).

[1] References to the Reporter's transcript of proceedings shall be indicated "Tr.", references to Plaintiff's exhibits as "P. Ex.", references to Defendant's exhibits as "D. Ex." and references to record documents filed with the Clerk as "R.".

Petitioner Baker learned at the time of releasing Respondent that a person was previously arrested as "Linnie Carl McCollan" but was, in fact Leonard McCollan, a brother of Respondent (Tr. 90, 91, 195, 196). Leonard McCollan had, at the time of his arrest, exhibited a driver's license describing Respondent and with Respondent's name and driver's license number thereon (Tr. 89-91). The date of birth and other description taken from the driver's license exhibited by Leonard McCollan was used to identify Respondent at the time of his arrest and was identical to the information contained on Respondent's then current driver's license (Tr. 189, 190, 241; D. Ex. 13, Tr. 147, 148; 192, 193).

Petitioner Baker's first actual knowledge that Respondent claimed not to be the person sought came on January 2, 1973, six days after the arrest and three days after his transfer to Potter County. Upon learning that Respondent claimed that the warrant should have been for his brother, Petitioner Baker investigated and acted immediately to secure the release of Respondent (Tr. 90, 91, 97, 98, 195, 196). Following the incident, Respondent Baker inaugerated a policy requiring deputies picking up prisoners in other jurisdictions to take with them available mug shots and fingerprint records (Tr. 68, 69). At the time of the arrest of Respondent such a policy either did not exist or was not being followed (Tr. 68, 69).

Respondent filed a complaint in the United States District Court for the Northern District of Texas seeking to recover under 42 U.S.C. § 1983 for false arrest and false imprisonment against the arresting police officer, the Dallas Chief of Police, Sheriff T. L. Baker and his surety Transamerica Insurance Company (R. 63). Prior to trial the arresting officer and the Dallas Chief of Police were dismissed from the suit (R. 87). After full trial on the merits, the trial court granted Petitioner's motion for directed ver-

dict and dismissed Petitioner and Transamerica Insurance Company from the case (R. 87). The Court of Appeals reversed and remanded for a new trial (App. pp. A-1 - A-7). A petition for rehearing was denied (App. p. 8).

REASONS FOR GRANTING THE WRIT

I.

THE COURT BELOW HAS DECIDED A FEDERAL QUESTION OF SUBSTANCE IN A MANNER IN A DIRECT CONFLICT WITH THE DECISION OF ANOTHER COURT OF APPEALS AND NOT IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT.

A. *Does simple negligence alone support a § 1983 cause of action?*

In the instant case, the arrest and confinement of Respondent was unquestionably in good faith reliance on a valid warrant. The warrant which served as the authority for arresting and holding Respondent was regular on its face and in the name of Respondent.[2] The Court below found that Petitioner's "subjective good faith" was not questioned[3] and that the Petitioner played no part in having the warrant issued in the wrong name.[4]

The Court below treated the warrant as conferring no authority for the arrest and confinement of Respondent and found a *prima facie* case to have been stated because it had been determined that Respondent was not the person who should have been named in the warrant. The holding of the Court below that there was a cause of action under § 1983

[2] The face of the warrant introduced as Plaintiff's Exhibit 7 is reproduced in the appendix, App. A-9.

[3] Opinion below, App. A-5.

[4] Opinion below, footnote 4, App. A-5.

was predicated upon no more than Petitioner's simple negligence in executing the warrant. Consistent with this the court below said:

> "The only real question in this case is whether the Sheriff's failure to introduce a policy of sending photographs and finger prints or his failure to have someone on duty to check Plaintiff's identity upon his arrival or during his stay at Potter County jail was unreasonable." (App. A-5).

In requiring a remand to answer the question posed, the Court necessarily found that simple negligence in administration by a public official did state a cause of action under 42 U.S.C. §1983.[5] In so holding, the opinion is in direct conflict with the holding of the 10th Circuit in *Atkins v. Lanning*, 556 F. 2d (10th Cir. 1977) and the pronouncements of this Court concerning the limitations to be placed upon 42 U.S.C. § 1983 as stated in *Paul v. Davis*, 424 U.S. 693, 96 S. Ct 1155, 47 L. Ed 2d 405 (1976).

The Court in *Atkins v. Lanning*, 556 F. 2d 485 (10th Cir. 1977) had before it a fact situation virtually indentical to that reviewed below. A warrant was mistakenly issued for "Timothy Adkins" and based thereon one Timothy Dale Atkins was arrested[6] and confined for some thirty-three (33) days before the mistake was discovered. The Court examined the conduct of the individuals whose

[5] The Court below did not even limit actionability under § 1983 to simple negligence. In fact, the Court held that since the person arrested was not the person actually wanted for the crime the arrest was unlawful and, that this stated a cause of action as a matter of law. Opinion below, App. A-4.

[6] The person actually sought was Edward Adkins, the warrant was issued for Timothy Adkins and the person arrested was Timothy Atkins. *Atkins v. Lanning*, 556 F. 2d 485, 487 (10th Cir. 1977.

negligence caused the mistake[7] and found that mere negligence in handling administrative duties would not support a cause of action under 42 U.S.C. § 1983. The *Atkins* Court said:

> "Simply because under state common law the slightest interference with personal liberty might constitute a false imprisonment, it does not follow that all such invasions, however trivial or frivolous, serve to activate remedies under the due process clause of the Fourteenth Amendment. . . ." *Id.* at 489.

In rejecting the negligence theory, the Court relied upon *Paul v. Davis, supra*, where this Court indicated that the Fourteenth Amendment was not ". . . a font of tort law to be superimposed upon whatever systems may already be administered by the state." 424 U.S. at 701.

Other Circuits have also examined the question of whether simple negligence may serve as the basis for a Section 1983 case.[8] In *Bonner v. Coughlin*, 543 F. 2d 565 (7th Cir. 1976) the Court reviewed the history of 42 U.S.C. § 1983 and concluded:

> ". . . [E]xtending Section 1983 to cases of simple negligence would not deter future inadvertance as much as in the case of intentional reckless conduct. Consequently, the majority of Circuits hold that mere negligence does not state a claim under Section 1983. Otherwise the Federal Courts would be inundated with State tort cases in the absence of Congressional intent to widen Federal jurisdiction so drastically." *Id.* at 568.

[7] The conduct in question here was the negligence of investigators who "caused" the erroneous warrant to be issued. Id. at 489. Below, the Court found causation when it concluded that Petitioner's ". . . failure to require his deputies to transmit the identifying material described above [mug shots and fingerprints] 'caused' Plaintiff's continued detention." Opinion below App. A-5.

[8] See, e.g., *Gittlemaker v. Prasse*, 428 F. 2d 1 (3rd Cir. 1970); *Church v. Hegstron*, 416 F. 2d 449 (2d Cir. 1969).

If the opinion below is allowed to stand, the Fourteenth Amendment will have become a pervasive Federal tort law, a possibility rejected by this Court in *Paul v. Davis, supra.*

B. *Does simple negligence in handling administrative procedures destroy the qualified immunity afforded public officials?*

In this case the Court below is holding that the arrest and confinement of an individual in good faith and pursuant to a warrant valid on its face is not alone sufficient to show reasonableness as a matter of law; standing alone such a showing merely poses a fact question to a jury as to the reasonableness of the arrest. This precept transcends the standard of care heretofore imposed by this court and other Circuit courts upon law enforcement officers as a requisite for avoiding liability under § 1983.

This court has on several occasions articulated lines of demarcation delimiting the § 1983 liability of law enforcement officials and other individuals for false arrest and false imprisonment, eg. *Pierson v. Ray*, 386 U.S. 547, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1957); *Scheuer v. Rhodes*, 416 U.S. 232, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974); *Wood v. Strickland*, 430 U.S. 308, 95 S. Ct. 992, 43 L. Ed. 2d 214 (1975). In a trenchant statement of the rationale for immunity, i.e., the public policy served thereby, Justice Burger noted in *Scheuer v. Rhodes, supra,* that

> Implicit in the idea that officials have some immunity — absolute or qualified — for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all. 416 U.S. at 242.

If the concept of qualified immunity is to have any meaning, then there must be some area within which an official may

exercise discretion without risking a damage action against him. By holding, in essence, that acts done in good faith and in reliance upon process seemingly valid are legally insufficient to insulate an officer any time there is the slightest evidence of negligence, the Court below has rendered the precept of qualified immunity inoperative.

In *Atkins v. Lannning, supra,* the Court applied the qualified immunity doctrine to exonerate the arresting officer. In holding that the good faith belief that his behavior was proper was sufficient where the officer was relying on a warrant regular on its face, the Court necessarily found that the warrant fulfilled the "objective reasonableness" requirement as a matter of law. Thus the Court did not consider it necessary or proper to go behind the warrant even though it was clear that the person arrested was not the person sought and there was even a difference in spelling of the name on the warrant and the name used by the person arrested.[9]

In the instant case, the warrant was in Respondent's name and Respondent was identified as the man wanted by means extraneous to the warrant. Nevertheless, the Court below treats the requirement of objective reasonableness as requiring a fact issue where there is any evidence of negligence. Such conclusion would appear to be in direct conflict with the concept of immunity stated in *Scheuer v. Rhodes supra,* which assumes that officials will err.

C. *Does an official "cause" an unlawful confinement merely because he has failed to act to discover the mistakes of others which were the cause, in fact, of the unlawful confinement?*

The Court below held that Respondent was unlawfully confined as a matter of law. Since the warrant should

[9] Id. at 47.

have been issued for Leonard McCollan the Court treated it as no authority for arresting Respondent notwithstanding that it named Respondent and other evidence tied him to the warrant. Even then, the Court below, in order to find evidence of a cause of action against Petitioner under § 1983, had to strain to find the requisite casual relationship between an act of Petitioner and the deprivation suffered by Respondent. The Court resolved their dilemma by holding:

> "Sheriff Baker's failure to require his deputies to transmit the identifying material described above [fingerprints and mug shots] 'caused' Plaintiff's continued detention."

The Court reached this conclusion by extending a prior holding in *Bryan v. Jones*, 530 F. 2d 1210 (5th Cir. en banc) cert. denied 429 U.S. 865 (1976) where the Court had held the Sheriff would be liable "[i]f he negligently establishes a record keeping system in which errors of this kind are likely. . . ." While the cases are very close, at least in *Bryan* the facts allowed the Court to characterize the questionable conduct as active negligence. Further, in that case there was absolutely no discretion insofar as the acts to be taken because the charges against the prisoner had been dismissed and an order communicated directing his release.

Here, the cause was misidentification which should allow for some discretion in conduct. Furthermore, the mistake that Petitioner failed to catch was one made by others. The causes, in fact, of the arrest of Respondent included the adoption of Respondent's identity by his brother Leonard, the use by Respondent's brother of a driver's license identical to that of Respondent except for the photograph, the failure of deputies working under Petitioner's predecessor to discover the use of an alias by Leonard, the existence

of two licenses with the same number and the same descriptive information contained thereon but with two different photographs, and ultimately the issuance of a warrant in the name of Linnie Carl McCollan.

In using the "but for" standard of causation to relate the Sheriff's act of omission to the confinement of Respondent one must question the lower Court's decision in other cases. In *Anderson v. Nosser*, 438 F. 2d 183 (5th Cir. 1971) modified and affirmed 456 F. 2d 835 (1972) cert. denied 409 U.S. 848, the Court reviewed, *inter alia*, the failure of officials to take prisoners before a magistrate in conformance with Mississippi law. Following a line of its own cases, the Fifth Circuit held that such failure, though it stated a false imprisonment claim under State law, did not state a cause of action under § 1983. Yet, "but for" the failure to take the prisoners before a magistrate, it could be easily argued that the confinement would have ended sooner.

The foregoing may simply be another way of raising the issue of whether simple negligence states a cause of action. Yet it does appear to be a valid basis for this Court granting certiorari. Section 1983 provides a cause of action only when "acting under color of law" a person "subjects, or causes to be subjected" a citizen "to the deprivation of any rights, privileges or immunities secured by the Constitution. . . ."

Possibly the explanation for the seeming dilemma posed above is the mischaracterization of Petitioner's conduct below. Clearly, if Petitioner caused Respondent to be confined and the confinement was unlawful, a cause of action would be stated under *Bryan v. Jones, supra.* Petitioner's act of omission, however, was the failure to institute a particular method of identification. In finding a cause of action, the Court below is, in effect, holding that due pro-

cess requires that a person to be arrested be identified by mug shots and fingerprints when available. Thus characterized, one finds a conflict here between the opinion below and this Court's recent holding in *Procunier v. Navarette*, ... U.S., ... 55 L. Ed. 24, 98 S. Ct. ..... (1978). There, this Court held that immunity existed as a matter of law where there was good faith and the deprivation was of a right not clearly recognized at the time as a constitutional right. No case has ever held that due process requires a specified manner of identifying a person to be arrested. Thus, Petitioner Baker's act of omission did not deprive Respondent of a recognized Federal right.[10]

II.

THE COURT BELOW HAS DECIDED A FEDERAL QUESTION OF SUBSTANCE PREVIOUSLY REVIEWED BY THIS COURT BUT NOT DECIDED BY THIS COURT.

In *Procunier v. Navarette, supra,* this court granted Certiorari to consider whether simple negligent conduct which interferes with a constitutional right gives rise to a claim under § 1983. The court below recognized that this question was the same as that raised in *Procunier* and withheld its opinion until this court ruled. This court decided *Procunier* on other grounds and left unanswered the issue raised herein.

In dissenting because the court did not decide the *Procunier* case on the grounds urged now, Chief Justice

[10] Where dealing with an area calling for discretion, this Court said in *Wood v. Strickland*, 420 U.S. 308, 43 L. Ed. 2d 214, 95 S. Ct. 992 (1975):

> ". . . § 1983 was not intended to be a vehicle for federal court correction of errors in the exercise of that discretion which do not rise to the level of specific institutional guarantees." 420 U.S. 326.

Burger proposed a rule of law which appears to conflict with the decision below. Justice Burger said:

> "I would hold that one who does not intend to cause and does not exhibit deliberate indifference to the risk of causing harm that gives rise to a constitutional claim is not liable for damages under § 1983." 55 L. Ed. 2d at 34.

Regardless of whether Justice Burger's position is ultimately adopted, review is essential because of the demonstrated conflicts developing in the Circuit Courts.

This case presents an excellent fact situation for determining the issue because there is no question regarding the good faith of Petitioner Baker. His only overt act in relation to Respondent was to secure Respondent's release. There was no evidence of intentional harm nor of deliberate indifference to harm caused. The sole basis for liability found by the Court below is the unintentional and possibly negligent failure to have instituted an administrative policy which *might* have earlier secured the release of Respondent.

If allowed to stand, the decision of the court below suggests two questionable rules of law: (1) that an act of omission amounting to no more than simple negligence states § 1983 claim; and (2) that the notion of qualified immunity from § 1983 liability inherently requires a jury determination of the reasonableness of the conduct in question.

The holding effectively creates a federally-protected constitutional right to be free from any negligence attributable to law enforcement officers and other officials by casting Section 1983 as an intrusive, all-inclusive federal tort statute, and emasculates the qualified immunity enjoyed by designated officials under the prior holdings of this Court.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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LINNIE CARL MCCOLLAN,
Plaintiff-Appellant,

v.

G. R. TATE ET AL.,
Defendants,

T. L. BAKER AND TRANSAMERICA
INSURANCE COMPANY,
Defendants-Appellees.

No. 76-1268.

United States Court of Appeals,
Fifth Circuit.

June 19, 1978.

Appeal from the United States District Court for the Northern District of Texas.

Before WISDOM and GEE, Circuit Judges, and VAN PELT,* District Judge.

GEE, Circuit Judge:

Plaintiff's name is Linnie McCollan. His brother, whose real name is Leonard McCollan, somehow procured a duplicate of plaintiff's driver's license, identical to plaintiff's except that Leonard's picture graced it instead of Linnie's. Leonard was arrested on a narcotics charge and since he was carrying the doctored driver's license, he was booked under the name of Linnie C. McCollan.

Leonard was released on bond. His bondsman received an order allowing him to surrender his principal and a warrant issued for the arrest of Leonard. Since Leonard had been using his brother's name, the warrant was in the name of

* Senior District Judge of the District of Nebraska, sitting by designation.

Linnie C. McCollan. Linnie (the real Linnie) was arrested on the warrant in Dallas County on December 26, 1972. He was kept in a Dallas jail until December 30, when deputies from Potter County, where the warrant had issued, took custody of him. He was kept in the Potter County Jail until January 2, 1973, when the error was noticed and he was released.

Linnie subsequently brought this action in federal court claiming violation of his rights under the fourteenth amendment and section 1983. The trial judge directed a verdict for Potter County Sheriff T. L. Baker and his surety, defendant Transamerica Insurance Company. Plaintiff's claims against all other defendants were dismissed with prejudice. Only the directed verdict as to Baker and Transamerica is before this court on appeal. Having originally postponed decision in this case pending the Supreme Court's disposition of *Procunier v. Navarette*, —— U.S. ——, 98 S.Ct. 885, 55 L. Ed. 2d 24 (1978),[1] we now hold that plaintiff's case should have been presented to the jury and, accordingly, we reverse and remand for a new trial.

The facts as developed at trial are largely undisputed, and to the extent there is conflict we must view the evidence in the light most favorable to the nonmoving party, in this case the plaintiff. *See Boeing Co. v. Shipman*, 411 F. 2d 365 (5th Cir. 1969) (en banc). If the evidence, when viewed in this light, is so one-sided that reasonable minds could not reach a contrary verdict, the district court's directing the verdict in favor of the defendant was proper.

[1] *Procunier*, which had been argued but not decided at the time of oral argument in this case, presented, *inter alia*, the issue of whether simple negligence on the part of a state official could give rise to § 1983 liability. See *Procunier v. Navarette*, *U.S.* , , 98 S. Ct. 855, 862—63, 55 L. Ed. 2d 24 (Burger, C. J., dissenting). However, the Supreme Court disposed of the case on other grounds.

Ibid. If reasonable minds could reach contrary conclusions, the issue should have gone to the jury.

When the Dallas police notified the Potter County Sheriff's Department that they had arrested "Linnie C. McCollan," the identification of plaintiff as the man wanted under the warrant was verified by his birthdate as shown on his license. Unfortunately, the written information on both Linnie C. McCollan's and Leonard (alias Linnie C.) McCollan's driver's licenses was identical. So this verification failed to reveal the error. The Potter County Sheriff's Department did not send the mugshots and fingerprints of Leonard McCollan which it had in its files. Nor did the sheriff's deputies who drove to Dallas to pick up the plaintiff take this identifying material with them. When the deputies brought plaintiff to the Potter County Jail on December 30, no one was on duty in the Identification Department, and no one compared plaintiff with the photographs and fingerprints on file. Had the photographs and fingerprints been sent or carried to Dallas or had the identifying information in the file at the sheriff's office been checked, the mistake would have been evident. Although plaintiff is Leonard's brother, he does not resemble Leonard in appearance.

The leading case in the Fifth Circuit on a sheriff's liability for false imprisonment under section 1983 is *Bryan v. Jones*, 530 F. 2d 1210 (5th Cir.) (en banc), *cert. denied*, 429 U.S. 865, 97 S. Ct. 174, 50 L. Ed. 2d 145 (1976). The court, sitting en banc, held that a sheriff has the kind of qualified immunity which the Supreme Court has recognized in certain other public officials. *See Wood v. Strickland*, 420 U.S. 308, 95 S. Ct. 992, 43 L. Ed. 2d 214 (1975); *Scheuer v. Rhodes*, 416 U.S. 232, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974); *Pierson v. Ray*, 386 U.S. 547, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1967). Under *Bryan* a sheriff is not liable under section 1983 if he acted in good faith and he acted reasonably. 530 F. 2d at 1215.

Bryan made clear that in a section 1983 false imprisonment action the reasonable good faith of the sheriff comes into play only as a defense. To make out a prima facie case, a plaintiff need show only: (1) intent to confine; (2) acts resulting in confinement; and (3) consciousness of the victim of confinement or resulting harm. 530 F. 2d at 1213, *citing* Restatement (2d) Torts § 35 (1965). There can be no doubt that the sheriff's deputies intended to confine and did confine the plaintiff. Similarly, there can be no doubt that plaintiff was aware of the fact that he was being held in jail. Since the deputies' actions were authorized by Sheriff Baker and the same actions were in keeping with the policies of the Potter County Sheriff's Department at that time, plaintiff established his prima facie case against Sheriff Baker. *See Jennings v. Patterson*, 460 F. 2d 1021 (5th Cir. 1972). *Cf. Rizzo v. Goode*, 423 U.S. 362, 96 S. Ct. 598, 46 L. Ed. 2d 561 (1976) (supervisory officials not subject to injunction under section 1983 where no showing that they authorized or approved lower officials' misconduct). Assuming *arguendo* that the actions and intent of the deputies are not properly attributable to the sheriff,[2] on the facts of this case

[2] Prior § 1983/false imprisonment cases have not dealt squarely with the problem of whether a sheriff must have personal knowledge that a person is being held in his jail in order for him to be liable under § 1983. *See Bryan v. Jones, supra; Whirl v. Kern*, 407 F. 2d 781 (5th Cir.), cert. denied; 396 U.S. 901, 90 S. Ct. 210, 24 L. Ed. 2d 177 (1969). In *Whirl* the court discussed the absence of personal knowledge only with respect to the state-law false imprisonment issue, over which the court had pendent jurisdiction 407 F. 2d at 795. With respect to the federal false imprisonment claim under § 1983, *Whirl* held that a sheriff need not know that a prisoner's detention is *unlawful*. But the opinion says nothing about a sheriff's knowledge that the prisoner is being detained and § 1983 liability. *Bryan* answered the qualified immunity question but said nothing about the application of respondeat superior notions to plaintiff's prima facie case. *See also Lewis v. Hyland*, —U.S.—, 98 S. Ct. 419, 54 L. Ed. 2d 291 (1977) (Marshall, J., dissenting from denial of certiorari); Developments, 90 Harv. L. Rev. 1133, 1206-09 (1977).

plaintiff was entitled to go to the jury on the basis of Sheriff Baker's own action or inaction. To incur liability under section 1983 a state official need not directly subject a person to a deprivation of his constitutional rights. The language of the statute[3] and the holdings of this court make clear that he can be held liable if he causes the plaintiff to be subjected to a deprivation of his constitutional rights. *See Sims v. Adams*, 537 F. 2d 829 (5th Cir. 1976). Sheriff Baker's failure to require his deputies to transmit the identifying material described above "caused" plaintiff's continued detention. Plaintiff has made out a prima facie case under *Bryan*, and Sheriff Baker can escape liability only if he acted in reasonable good faith. As the court said in *Bryan*, "[i]f [the sheriff] negligently establishes a . . . system in which errors of this kind are likely, he will be held liable." 530 F. 2d at 1215.

The only real question in this case is whether the sheriff's failure to introduce a policy of sending photographs and fingerprints or his failure to have someone on duty to check plaintiff's identity upon his arrival or during his stay at Potter County Jail was unreasonable.[4] Since plaintiff in no way challenges the subjective good faith of the sheriff, his qualified immunity hangs on the reasonableness of his

[3] Section 1983 reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, *or causes to be subjected*, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

(Emphasis added).

[4] Since the sheriff did not take office unntil after the warrant had issued in the name of "Linnie C. McCollan," he cannot be held responsible for any conduct by the sheriff's department prior to that time.

action or inaction. The sheriff himself testified that it was a standard practice in most sheriff's departments the size of his to send such identifying material. Certainly the jury could have found that he behaved unreasonably in failing to institute a similar policy. Alternatively, the jury might have concluded that comparing the date of birth, as listed in the sheriff's files, with the date of birth on plaintiff's driver's license when he was arrested in Dallas was sufficient safeguard against arresting and detaining the wrong person and that it was reasonable for the sheriff not to require his deputies to take the additional precaution of sending the photographs and fingerprints.

Defendant contends that the existence of the warrant for the arrest of a person named Linnie C. McCollan created a duty in him to arrest and detain the plaintiff. He relies on *Perry V. Jones*, 506 F. 2d 778 (5th Cir. 1975), for the proposition that since plaintiff was arrested and detained on a warrant fair on its face, he has committed no wrong cognizable under section 1983.

Defendant misperceives his duties. His argument would find a duty in a police officer or sheriff to arrest any person who bears the name in which a warrant was issued. A warrant for John Smith would put a policeman under a duty to arrest the first John Smith, or perhaps all John Smiths, he encountered. Such cannot be the law.

We are not saying that a sheriff is under a duty to make an independent investigation as to the guilt or innocence of a person wanted under a warrant. If a warrant was issued for the arrest of an individual and the individual *actually* wanted under that warrant is arrested, the arresting officer has fulfilled his duty, and he will not be liable for false arrest or false imprisonment merely because the person arrested is later found to be innocent of the charges

against him. *Perry v. Jones, supra.* We are saying that the sheriff or arresting officer has a duty to exercise due diligence in making sure that the person arrested and detained is actually the person sought under the warrant and not merely someone of the same or a similar name. *See* Restatement (2d) Torts § 125, comment (d) 1965).

REVERSED AND REMANDED.

IN T . UNITED STATES COURT OF A ALS
FOR THE FIFTH CIRCUIT

. COURT OF APPE.
FILED
AUG 10 1978
OWARD W. WADSWORTH
CLER

NO. 76-1268

LINNIE CARL McCOLLAN,

Plaintiff-Appellant,

versus

G. R. TATE, ET AL.,

Defendants,

T. L. BAKER and TRANSAMERICA INSURANCE COMPANY,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

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ON PETITION FOR REHEARING

(August 10, 1978)

Before WISDOM and GEE, Circuit Judges, and VAN PELT*, District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

United States Circuit Judge

*Senior District Judge of the District of Nebraska, sitting by designation.

WARRANT OF ARREST OR CAPIAS

RECEIVED at 2:00 o'clock P M
NOV 3 1972
POTTER COUNTY, TEXAS
SHERIFF'S OFFICE
BY _____ DEPUTY

THE STATE OF TEXAS

To the Sheriff or Any Constable of Potter County, Said State—GREETINGS:

You are Commanded to take the body of LINNIE CARL McCOLLAN

and bring him before me at my office in Amarillo, in said County, on the instanter, then and there to answer the STATE OF TEXAS, for an offense against the laws of said state, to-wit: SALE OF NARCOTICS

AFFIDAVIT FILED BY JOHNNIE CARTER TO BE RELEASED AS SURETY ON BOND

of which offense he is accused by the written Complaint under oath of JOHNNIE CARTER

filed before me.

HEREIN FAIL NOT but have you then and there, before me, this writ with your return endorsed thereon, showing how you have executed the same.

Witness my signature on this, the 3rd day of November 1972.

Justice of Peace, Precinct No. One, Potter County, Texas
C. L. Roberts

PLAINTIFF'S EXHIBIT 7